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SUPREME COURT, U.S.
FILED
AUG 4 1995

No. 94-7427

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH V. LIBRETTI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether Federal Rule of Criminal Procedure 11(f) requires a district court to determine whether there is a "factual basis" for a stipulation, contained in a plea agreement, regarding the scope of property subject to criminal forfeiture.

2. Whether the order of forfeiture entered in this case was invalid because petitioner had not been specifically informed of his right to have a jury determine the scope of forfeitable assets.

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OPINION BELOW

The opinion of the court of appeals (J.A. 313-329) is reported at 38 F.3d 523.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1994. J.A. 313. The petition for a writ of certiorari was filed on December 27, 1994, and was granted on March 27, 1995 (J.A. 330). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Federal Rules of Criminal Procedure 7, 11, 23, 31, and 32, and 21 U.S.C. 848 and 853, are reprinted in pertinent part at App., *infra*, 1a-5a.

STATEMENT

After entering a guilty plea in the United States District Court for the District of Wyoming, petitioner was convicted of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (1988 & Supp. V 1993). He was sentenced to 20 years' imprisonment, to be followed by five years of supervised release. He was also fined $5,000 and ordered to forfeit certain property. The court of appeals affirmed. J.A. 313-329.

1. On May 22, 1992, a federal grand jury returned an 11-count superseding indictment, charging petitioner with violations of the federal drug, firearms, and money laundering laws. J.A. 38-71.[1] Conviction on Counts 2 and 6 alone would have carried a minimum total sentence of 50 years' imprisonment. See 18 U.S.C. 924(c)(1) (mandatory minimum sentence of 30 years' imprisonment for use of firearm equipped with silencer, to be imposed

[1] Petitioner was charged with conspiring to distribute cocaine and marijuana, and to possess cocaine and marijuana with intent to distribute them, in violation of 21 U.S.C. 846 (Count 1); using or carrying firearms and silencers during and in relation to the drug conspiracy, in violation of 18 U.S.C. 924(c) (Count 2); traveling in interstate commerce to facilitate drug trafficking, in violation of 18 U.S.C. 1952(a)(3) (Count 3); possession of a machine gun, in violation of 18 U.S.C. 922(*o*)(1) (Count 4); investment of illegal drug proceeds, in violation of 21 U.S.C. 854 (Count 5); operating a CCE, in violation of 21 U.S.C. 848 (Count 6); money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i), 18 U.S.C. 2(b) (Counts 7-8); obstruction of justice, in violation of 18 U.S.C. 1503 (Counts 9-10); and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 11).

consecutive to any other term of imprisonment); 21 U.S.C. 848(a) (mandatory minimum sentence of 20 years' imprisonment for CCE offense); see J.A. 325. The drug offenses also carried potential fines of up to $2 million, 21 U.S.C. 848(a), or twice the gross profits or proceeds, 21 U.S.C. 853(a).

The charged drug offenses further provided for an order of forfeiture to be imposed at sentencing. Section 853(a) of Title 21 provides that a person convicted of a felony drug offense "shall forfeit * * * any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" his offense, as well as "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of," his offense. For persons convicted of engaging in a CCE, the statute provides for additional forfeiture of the person's "interest in, claims against, and property or contractual rights affording a source of control over" the CCE. 21 U.S.C. 853(a)(3). Section 853(p) further provides that where property subject to forfeiture under Section 853(a) cannot be recovered by the government, "the court shall order the forfeiture of any other property of the defendant up to the value of" the forfeitable but unrecoverable assets.

Pursuant to those provisions and Rule 7(c)(2) of the Federal Rules of Criminal Procedure, the indictment alleged that, "[u]pon the conviction of [petitioner] for engaging in a [CCE] as charged in * * * Count [6]," the government was entitled to forfeiture of the property that was obtained from or used to facilitate petitioner's drug offenses, "including but not limited to" various specified assets. J.A. 64; see J.A. 64-67 (listing assets). Additional assets alleged to be subject to forfeiture were subsequently identified in a restraining order issued and

later amended by the district court under 21 U.S.C. 853(e). See J.A. 72-78.[2]

On September 28, 1992, petitioner's jury trial began. During the first week of trial, the government called 18 witnesses, nine of whom had purchased cocaine from petitioner, and five of whom were themselves drug dealers whom petitioner supplied and supervised while he was living in Colorado and Wyoming. Those witnesses testified that they had bought multi-ounce quantities of cocaine from petitioner, at prices ranging from $1,600 to $1,800 per ounce, on a weekly or monthly basis over periods of several months or years. See, *e.g.*, 9/29/92 Trial Tr. 124-126; 10/1/92 Trial Tr. 495-501; 10/2/92 Trial Tr. 946-949. Petitioner advised and assisted the drug dealers operating under him, counseling them to store cocaine and cash in bank safety deposit boxes, 10/1/92 Trial Tr. 503-505; helping them steal from customers who owed money, *id.* at 713-716; and generally "impos[ing] his ideology upon [them] * * * to provide a quality product," 10/2/92 Trial Tr. 949. Indeed, petitioner's attorney acknowledged in his opening statement that the government's evidence would show that petitioner "got involved in the use of drugs" and "with a little bit of sales," and that he ultimately "advanced to [be] a pretty big salesman" in cocaine and marijuana. 9/29/92 Def.'s Op. Stmt. Tr. 5.

Petitioner's drug profits enabled him to acquire expensive assets at a time when he had only modest sources of legitimate income. In the fall of 1985, just after graduating from college and while earning an annual salary

[2] Section 853(e) provides, in relevant part, that, "[u]pon application of the United States, the court may enter a restraining order * * * to preserve the availability of property described in subsection (a) of this section for forfeiture under this section."

of approximately $20,000, petitioner bought a $200,000 home with a down payment of $100,000. See 9/29/92 Trial Tr. 121-122, 179-180, 207-222; 10/2/92 Trial Tr. 922; Presentence Report (PSR) ¶ 37. He installed two large safes in the basement of the house, and he kept cocaine, weapons, and as much as $20,000 in cash in the safes or in other parts of the home. 9/29/92 Trial Tr. 57, 137-142; 10/1/92 Trial Tr. 735-744. Petitioner also became a federal firearms dealer and bought dozens of automatic and semi-automatic weapons, later determined to be worth at least $243,000. See, *e.g.*, 9/29/92 Trial Tr. 140-141, 156-162; 10/1/92 Trial Tr. 542-545; 10/2/92 Trial Tr. 844-853, 903-906; J.A. 123. In 1990, petitioner bought a Toyota Celica with a check for $19,114. 10/2/92 Trial Tr. 912-913.

Petitioner saved much of his profits, however, storing cash, cashier's checks, and drugs in safety deposit boxes and storage facilities away from his home. See 9/29/92 Trial Tr. 155-156; 10/1/92 Trial Tr. 503-505, 718-720. In 1987, one of petitioner's drug customers broke into one of petitioner's rooms at a storage facility: he found a briefcase containing approximately $150,000 in hundred dollar bills; a large block of cocaine; and five 30-gallon trash bags, at least one of which was filled with marijuana. 10/1/92 Trial Tr. 559-566, 588-589. In an interview with the Lakewood, Colorado, Police Department, petitioner admitted that he owned the cocaine, cash, and marijuana in the storage locker. 9/29/92 Trial Tr. 18-19, 34-35. In 1988, petitioner boasted to his ex-girlfriend that he had $250,000 in cash stored in safety deposit boxes, and that some of the safety deposit boxes were in his brothers' names. 10/2/92 Trial Tr. 831, 833-835.

2. At the end of the first week of trial, petitioner entered into a plea agreement with the government. The agreement provided that petitioner would plead guilty to engaging in a CCE, as charged in Count 6 of the

indictment. In return, the government agreed not to file additional charges against him, and to recommend the mandatory minimum prison term of 20 years. J.A. 79-80, 85. Petitioner further agreed

> to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, traveler's checks and funds of any kind.

J.A. 81. Petitioner also "acknowledge[d] that by pleading guilty to Count Six of the Indictment, he waives various constitutional rights, including the right to a jury trial." J.A. 80.

At the change of plea hearing, the district court advised petitioner of his rights, including his "right to a speedy and public jury trial, which we're in the middle of." J.A. 86. The court explained to petitioner that if he pleaded guilty, "it's going to be the end of this trial," and "the jury is not going to decide whether you're guilty or not. I'll dismiss them after this, and that will be that." J.A. 87. The court also explained "the consequences of [petitioner's] plea," including the fact that he "could be fined $2 million" and that "all the property that's described in this Count 6 could be forfeited to the United States." J.A. 88.

The court asked petitioner whether he understood the consequences of his plea, and petitioner stated: "There is only one part I didn't understand. They said that they can take up to one and a half million dollars from me at any time. Let's say 20 years from now I get a job, I get a paycheck. They can come and take that?" J.A. 88.

After consulting with petitioner's attorney, the court explained that the forfeiture was limited to tainted assets, and that petitioner's future legitimate income would not be forfeited. J.A. 88-89.

The court then explained to petitioner that "I will have to question you as to whether or not your guilty plea is a voluntary plea and whether or not there's a factual basis for the plea." J.A. 89. The court read aloud the 26 paragraphs of Count 6 of the indictment. J.A. 90-97. The court also read aloud the provisions of Count 6 describing the property alleged to be forfeitable. J.A. 97-98. Petitioner confirmed under oath that he understood the indictment and the plea agreement, and specifically that he understood "that all of [his] property could be forfeited, the property that is owned by [him] by reason of any drug transaction." J.A. 100. Petitioner pleaded guilty to Count 6. J.A. 99. The district court found "that the plea of guilty is * * * voluntary," and that "there is a factual basis for the guilty plea." J.A. 121.

3. a. Before sentencing, the government filed a "Prosecutor's Statement" outlining petitioner's illegal activities and describing some of the assets that he had purchased with the proceeds of his crimes. J.A. 122-135.[3]

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[3] In particular, the Prosecutor's Statement reported that petitioner had used $72,000 in drug proceeds to pay for his house in Lakewood, Colorado; used $20,000 in drug proceeds to buy a GNMA mortgage certificate as an investment; used $243,000 in drug proceeds to buy automatic and semi-automatic firearms and silencers; maintained hundreds of thousands of dollars in cash in storage lockers and bank safety deposit boxes, and in bank accounts in the names of his relatives; and laundered drug proceeds through his firearms business and by purchasing cashier's checks, automobiles, real property, and other investments. Finally, the Statement outlined other sums of money petitioner had earned from his drug dealing, including $68,000 in cash found in safety deposit boxes and other locations, and more than

The Presentence Report (PSR) detailed petitioner's legitimate employment and earnings record during the same time period. Between his graduation from college in 1985 and his arrest in 1991, petitioner earned no more than $50,000 per year and typically earned much less. PSR ¶¶ 35-37.[4] Petitioner conceded that the PSR's "report of [his] background, education, [and] financial circumstances are [*sic*] accurate." J.A. 138.

At the sentencing hearing held on December 23, 1992, the government filed a motion for forfeiture of all of petitioner's known assets. J.A. 136-154. Defense counsel offered no objection to that motion, asserting that the forfeiture statute was "a harsh law" and "a bitter pill dealt by Congress," but conceding that it was "a pill we must swallow." J.A. 149. Counsel acknowledged that, "as a result of [petitioner's crime], the forfeiture is going to take regular money and illegal money under the substitute assets" provision of the forfeiture statute, 21 U.S.C. 853(p). J.A. 149. The court granted the motion, issuing an order of forfeiture that day. J.A. 150, 155-164.

The forfeiture order stated that it was based on petitioner's "agree[ment] to the forfeiture of any right,

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$100,000 in additional cash that the authorities never recovered. J.A. 122-135. Petitioner's drug dealing profits were estimated to be in excess of $1 million. J.A. 237-238 (government witness's testimony in post-judgment proceedings).

[4] During 1985 and 1986, petitioner earned approximately $20,000 per year managing a restaurant and a grocery store. In 1987, petitioner worked as a temporary stockbroker, being paid on commission only, and then managed a thrift store for the remainder of the year. In 1988, petitioner was involved in a real estate transaction that resulted in a loss. In 1989, petitioner claimed that he earned $50,000 per year operating his firearms business. From June 1, 1989, until his arrest on December 4, 1991, the PSR stated, petitioner earned approximately $40,000 per year in legitimate activities. PSR ¶¶ 35-37.

title and interest as to him, as to all such property described" in the order; in particular, the order relied on petitioner's "plea agreement * * * in which [he] agreed to forfeit all property." J.A. 155. The order called for forfeiture of three pieces of real property, two automobiles, a mobile home, several firearms, bank accounts, cashier's checks, traveler's checks, bonds, GNMA certificates, and a diamond ring. J.A. 155-164. One check was forfeited as a substitute asset. J.A. 162. Every item forfeited either had been seized by the government before petitioner's trial or had been identified in the restraining order and its two amendments, the last of which was issued by the district court three weeks before the plea agreement was signed. See, *e.g.*, J.A. 25-37, 74-78 (restraining order and amendment).[5] The total value of the forfeited property was approximately $410,000. See J.A. 329.

As the government had recommended in the plea agreement, the district court sentenced petitioner for his CCE offense to the statutory minimum term of 20 years' imprisonment, to be followed by five years' supervised release. J.A. 152. The court also imposed a $5,000 fine, J.A. 153, which was far less than the applicable statutory maximum and recommended range under the Sentencing Guidelines. See 21 U.S.C. 848(a), 853(a) (establishing maximum fine of the greater of $2 million or "twice the gross profits or other proceeds" that petitioner derived from his CCE); Guidelines § 5E1.2(c) (fine

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[5] Two bank accounts in the forfeiture order, Items (U) and (V), had not been previously identified in the restraining order or its amendments. The court later determined that those accounts were owned by petitioner's parents, and the court ordered them returned. J.A. 310. The court also ordered Item (G), a diamond ring, returned to petitioner's girlfriend, Claudia Porter. *Ibid.*

range for petitioner was from $25,000 to the statutory maximum). Although the court found that "some fine is necessary," in light of the "large quantities of drugs involved in this case," the court took into account "that there has been a forfeiture of almost all of the illicit gains that [petitioner] achieved." J.A. 152.

After the court had imposed the sentence, petitioner asked, "Are we over?" The court answered, "I think so," and petitioner stated: "Well, then, with that in mind, I would just like to object to what I see as a failure to find any factual basis for the whole forfeiture, just for the record." J.A. 154. The court noted the objection, but explained that "the evidence that I heard before me in the two days of trial I think is sufficient to warrant the granting of forfeiture. I think I have no alternative." *Ibid*. On December 29, 1992, petitioner filed a notice of appeal from the forfeiture order. J.A. 3.

b. While the case was pending before the court of appeals, notice was published of the forfeiture. The district court then entertained third party claims to some of the forfeited property, resolved disputes about ownership, and ordered certain property returned. J.A. 299-308, 310, 316; see 21 U.S.C. 853(n)(6)(A)-(B). On April 2, 1993, the court also modified its forfeiture order with respect to petitioner, determining "that it may be unjust to enforce the specific forfeiture provisions in the plea agreement." J.A. 309. The court stated that "a defendant's concession in a plea agreement to the forfeiture of his property does not make it so," and ordered "the Magistrate [to] conduct a fact finding hearing in which [petitioner] is given an opportunity to show by a preponderance of the evidence that his property is not subject to forfeiture." J.A. 309-310 (citation and internal quotation marks omitted). On June 7, 1993, the district court granted the government's motion to stay proceedings before the magistrate judge pending the disposition of petitioner's appeal. Gov't C.A. Br. 12.

4. The court of appeals affirmed. J.A. 313-329. The court first held that, during the pendency of the appeal, the district court had correctly exercised "jurisdiction to consider third party claims to property," but that the court "lack[ed] jurisdiction to consider [petitioner's] claims" to the forfeited property. J.A. 318-319.

The court then rejected petitioner's contention that the district court had violated Federal Rule of Criminal Procedure 11(f) by failing to satisfy itself that there was a factual basis for the forfeiture. Noting that "[t]he parties both acknowledge that criminal forfeiture under § 853 is a part of the sentence, not a part of the substantive offense," J.A. 322; see also J.A. 318, the court held that "a sentencing judge is not required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain with the government," because "Rule 11(f) only applies to the guilty plea," not to the sentence imposed pursuant to that plea. J.A. 321-322 (quoting *United States* v. *Boatner*, 966 F.2d 1575, 1581 (11th Cir. 1992)).

The court also rejected petitioner's argument that the plea agreement was "ambiguous and vague," J.A. 323, with respect to the scope of the property stipulated to be forfeitable. The court explained that petitioner had "unambiguously forfeited all of his property," J.A. 325, and that he "intended to forfeit all of his property without requiring the government to prove the assets were forfeitable," J.A. 324. The court acknowledged that some of petitioner's assets "on their face had no connection with his drug dealings," J.A. 325, but observed that property subject to forfeiture under 21 U.S.C. 853

"includes forfeitable assets under § 853(a) and substitute assets under § 853(p)," J.A. 324-325.

The court noted that petitioner had "received a favorable plea agreement." J.A. 325. Petitioner had entered into the agreement only "after the government presented overwhelming evidence of his guilt" during the first week of trial, and he thereby avoided conviction on firearms charges that would have carried a mandatory minimum "thirty-year sentence consecutive to the sentence on the underlying [CCE] offense." *Ibid.* Thus, the court explained, petitioner was "seek[ing] the benefit of [his] bargain, but only to the extent it favors him." *Ibid.* The court held that it would "not require the government to undergo a fact-finding hearing and forego [*sic*] a substantial benefit of its bargain" with petitioner. *Ibid.*

Finally, the court rejected petitioner's claim that "he was not advised of and did not waive his right to a jury trial on forfeiture issues." J.A. 326. The court of appeals noted that the absence of a Sixth Amendment right to have punishment determined by a jury "suggests that [petitioner] does not have a *constitutional* right to a jury trial at the forfeiture stage of these proceedings." J.A. 326. The court concluded, however, that it "need not decide" whether petitioner had a constitutional right to a jury trial on forfeiture "because constitutional rights can be waived, and because a defendant does have a *statutory* right, pursuant to Fed.R.Crim.P. 31(e), to have a jury determine which of his assets may be forfeited. Thus, we must determine whether [petitioner] waived his right to a jury trial." J.A. 327 (citation omitted). Based on its examination of the record, the court held that petitioner had waived his right to a jury trial on the issue of forfeiture. See J.A. 327-328. In particular, the court noted that "there is no evidence at [the change of plea] hearing that [petitioner] wanted a jury trial on the forfeiture issue, or thought he was going to have one." J.A. 328.[6]

SUMMARY OF ARGUMENT

I. Federal Rule of Criminal Procedure 11(f) requires a district court to satisfy itself that there is a "factual basis" for a criminal defendant's "plea of guilty." That provision has no application to admissions or stipulations that are relevant to sentencing but not to the defendant's guilt of the substantive offense. Forfeiture of particular assets is properly regarded as part of the punishment for a criminal offense, not as an element of the crime. Both the text and legislative history of the Comprehensive Crime Control Act of 1984 make clear that Congress viewed criminal forfeiture as a penalty, and the courts of appeals have uniformly adopted that characterization. There is also no basis in logic for regarding forfeiture as an element of the CCE offense, since an order of forfeiture is not a prerequisite to conviction of that crime.

Petitioner's principal contention is that criminal forfeiture should be treated as an element of the offense in applying Rule 11(f) because the Federal Rules of Criminal Procedure were amended in 1972 to provide that forfeiture must be alleged in the indictment, submitted to the jury, and separately identified in the judgment. See Fed. R. Crim. P. 7(c)(2), 31(e), and 32(d)(2). That argument is without merit. The premises that underlay the 1972 amendments are of no relevance in construing the "factual basis" requirement, which was

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[6] The court of appeals also rejected petitioner's contention that the scope of the forfeiture violated the Excessive Fines Clause of the Eighth Amendment, see J.A. 328-329, a claim that petitioner does not press in this Court.

added to Rule 11 in 1966. Nor can the Advisory Committee's Notes on one Rule alter the textual requirements of another. In any event, there is no evidence that, in the promulgation of the amendments, this Court or Congress shared the Advisory Committee's stated view about the nature of forfeiture. And Congress clearly regarded forfeiture as an aspect of punishment, both before and after the 1972 amendments.

The possibility that forfeiture stipulations may sometimes be misused provides no basis for treating such stipulations as part of a defendant's "plea." The standards generally applicable to sentencing stipulations provide ample protection against overreaching. Although the court is not obligated to accept the facts as stipulated, the premise of an adversary system is that the court resolves disputes between the parties and accords presumptive validity to statements upon which the parties agree.

II. Petitioner's agreement to forfeit all of his assets at sentencing was valid even though he was not specifically informed by the court that Rule 31(e) of the Federal Rules of Criminal Procedure affords a right to a jury verdict "as to the extent of the interest or property subject to forfeiture." The district court determined that petitioner knowingly and voluntarily waived his right to a jury determination on the issue of guilt and that he was aware that the jury would be dismissed; the court had no further obligation to inform petitioner that he had a right to a jury trial on the issue of forfeiture. The Constitution does not provide a right to jury sentencing. And the right to a jury finding on forfeiture under Rule 31(e) is not one of the small category of fundamental rights that requires compliance with the waiver standard of *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Although petitioner was not specifically instructed that he had a right to a jury determination of

forfeiture, his knowing and voluntary agreement about the scope of forfeitable assets was intended to remove any right to dispute that issue—before a jury or otherwise. That waiver of rights was fully valid.

ARGUMENT

I. RULE 11(f) DOES NOT APPLY TO A STIPULATION, CONTAINED IN A PLEA AGREEMENT, THAT PARTICULAR ASSETS ARE SUBJECT TO CRIMINAL FORFEITURE

Rule 11(f) of the Federal Rules of Criminal Procedure states that, "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." A "plea of guilty" constitutes a defendant's admission of guilt of a substantive offense and his waiver of the right to trial on that charge. By contrast, admissions or stipulations that are relevant to sentencing, but not to the defendant's guilt of the substantive offense, are extrinsic to the plea. Because criminal forfeiture is a punishment, not an element of a substantive crime, petitioner's stipulation regarding forfeiture was not subject to the requirements of Rule 11(f).

A. A Guilty Plea Admits The Commission Of An Offense Rather Than The Appropriateness Of A Particular Sentence

1. A guilty plea constitutes "the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind." *North Carolina* v. *Alford*, 400 U.S. 25, 32 (1970). In *McCarthy* v. *United States*, 394 U.S. 459 (1969), the Court explained that "a guilty plea is an admission of all the elements of a formal criminal charge." *Id.* at 466. Applying that definition to Federal Rule of Crimina!

Procedure 11, the Court held that the trial judge could "satisfy himself that there is a factual basis for the plea" by "determin[ing] 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.'" 394 U.S. at 467 (quoting Fed. R. Crim. P. 11 advisory committee's note, 18 U.S.C. App. at 739). The Court suggested that the trial judge should "personally address[] the defendant as to his understanding of the essential elements of the charge to which he pleads guilty," at least "where the charge encompasses lesser included offenses." 394 U.S. at 467 n.20; see *id.* at 471. See also *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (a guilty plea is an "admission that [the defendant] committed the crime charged against him," so that a defendant who pleads guilty "is admitting guilt of a substantive crime") (internal quotation marks omitted); *Santobello* v. *New York*, 404 U.S. 257, 261 (1971) (trial judge may satisfy rule "by having the accused describe the conduct that gave rise to the charge"); *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Henderson* v. *Morgan*, 426 U.S. 637, 648 (1976) (White, J., concurring).

The Advisory Committee's Note to Rule 11(f) confirms that the "factual basis" test applies only to the elements of the offense. The 1966 amendment to Rule 11, which created the "factual basis" requirement, was designed to ensure "that the conduct which the defendant admits constitutes the offense charged." 18 U.S.C. App. at 739. The Advisory Committee explained that the factual basis test would thereby "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Ibid.* Indicating that the rule was modeled on

a similar requirement in Michigan law, the Committee cited authorities that made clear that the court's obligation was to determine the factual basis for the crime charged. *Ibid.*, citing, *e.g.*, *People* v. *Barrows*, 99 N.W.2d 347, 349 n.1, 350 (Mich. 1959) (quoting Michigan statute that required the judge, "whenever [he] shall have reason to doubt the truth of such plea of guilty, * * * to vacate the same, direct a plea of not guilty to be entered and order a trial of the issues thus formed"; the *Barrows* court noted that the questioning "required by the rule [is] for the purpose of establishing the crime and the participation therein of the person pleading guilty").

An amendment to Rule 11 that took effect in 1975 "retain[ed] the [factual basis] requirement of old rule 11," and codified it as new subsection (f) of the rule. See 18 U.S.C. App. at 743. The Advisory Committee's Note indicated that the requirement may be satisfied "by having the accused describe the conduct that gave rise to the charge," and observed that the Rule "does not speak directly to the issue of whether a judge may accept a plea of guilty where there is a factual basis for the plea *but the defendant asserts his innocence.*" *Ibid.* (emphasis added). That discussion indicates that Rule 11(f)'s "factual basis" inquiry was intended to apply only to charges as to which the defendant could either admit guilt or maintain innocence, *i.e.*, substantive criminal offenses.

2. Although a variety of terms may be included in a single document containing the defendant's agreement to plead guilty, the term "plea of guilty" in Rule 11(f) is not synonymous or coextensive with the concept of a "plea agreement." A "plea agreement" may contain terms separate and distinct from the defendant's admission that he is guilty of the charged offense, including terms relating to the dismissal of related charges, to the

defendant's cooperation, or to sentencing. The factual basis requirement of Rule 11(f) was not intended to apply to such provisions. Indeed, the 1966 version of Rule 11 contained no reference at all to plea agreements, the legitimacy of which was at that time substantially uncertain. See *Blackledge* v. *Allison*, 431 U.S. 63, 76 (1977) ("[I]t was not until our decision in *Santobello* v. *New York*, 404 U.S. 257 [1971], that lingering doubts about the legitimacy of the practice were finally dispelled"); Fed. R. Crim. P. 11 advisory committee's note, 18 U.S.C. App. at 741-742 (1974 Amendment).

The courts of appeals have uniformly held that the requirements of Rule 11(f) apply only to the elements of the offense, and not to other factual issues that may determine a defendant's sentence. In *United States* v. *Reyes*, 13 F.3d 638 (2d Cir. 1994), for example, the defendant pleaded guilty to conspiring to import cocaine, in violation of 21 U.S.C. 963. He later claimed that he should have been allowed to withdraw his plea because "there was an insufficient factual basis," under Rule 11(f), "to establish the nature and quantity of narcotics that [he] was charged with conspiring to import." 13 F.3d at 640. Although the defendant's sentence turned on the quantity of cocaine involved in his offense, see 21 U.S.C. 960(b) (1988 & Supp. V 1993), the Court rejected his reliance on Rule 11(f) because "the quantity of cocaine is not an element of this offense." 13 F.3d at 640.

As the First Circuit recently explained, "[t]hough a district court has an unflagging obligation to assure itself that a guilty plea is grounded on an adequate factual foundation, it need not gratuitously explore points removed from the elements of the offense." *United States* v. *Piper*, 35 F.3d 611, 615-616 (1st Cir. 1994) (citations omitted), cert. denied, 115 S. Ct. 1118 (1995). Thus, for example, a trial court may not "reject a knowing

and voluntary guilty plea [merely] because a defendant refuses to admit to facts external to the essential elements of the offense charged," even if those facts are alleged in the indictment. *United States* v. *Washington*, 969 F.2d 1073, 1077 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1287 (1993). Correspondingly, a defendant may not overturn a guilty plea merely because there is no factual basis for such "external" allegations.[7]

B. Criminal Forfeiture Is An Element Of The Sentence, Rather Than Of A Substantive Offense

Criminal forfeiture pursuant to 21 U.S.C. 848 and 853 is properly regarded as a punishment for conducting a continuing criminal enterprise, rather than as an element of that crime or as a free-standing offense. Thus, the "factual basis" requirement in Rule 11(f) is inapplicable to stipulations regarding forfeiture.

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[7] See *United States* v. *Ivory*, 11 F.3d 1411, 1415-1416 (7th Cir. 1993) (per curiam) (because 21 U.S.C. 846 "does not require the prosecutor to prove an overt act," "Rule 11 is satisfied if the record provides a factual basis for concluding that [the defendant] agreed to distribute drugs" without showing that he actually did so); *United States* v. *Adams*, 961 F.2d 505, 508 (5th Cir. 1992) (per curiam) ("The record must reveal specific factual allegations supporting each element of the offense."); *United States* v. *Allen*, 804 F.2d 244, 245 (3d Cir. 1986) ("The district court must also find a factual basis for each element of the crime."), cert. denied, 480 U.S. 922 (1987); *United States* v. *Bernaugh*, 969 F.2d 858, 866 (10th Cir. 1992) (discussing Rule 11(f) in terms of the elements of the offense); *United States* v. *Morrow*, 914 F.2d 608, 611-613 (4th Cir. 1990) (same); *United States* v. *Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988) (same); *United States* v. *Ray*, 828 F.2d 399, 406-407 (7th Cir. 1987) (same), cert. denied, 484 U.S. 964, 1045 (1988); cf. *United States* v. *Armstrong*, 951 F.2d 626, 629 (5th Cir. 1992) (factual basis must show that "the defendant's conduct was within the ambit of that defined as criminal"); *United States* v. *DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991) (court must find factual basis "sufficient to constitute the alleged crime"), cert. denied, 503 U.S. 997 (1992).

1. As this Court has recognized, the legislature has substantial discretion to define the elements of criminal offenses. While "[t]he prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements," *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2080 (1993) (citations omitted), "[t]he applicability of the reasonable-doubt standard * * * has always been dependent on how a State defines the offense that is charged in any given case," *Patterson* v. *New York*, 432 U.S. 197, 211 n.12 (1977). In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Court applied that principle in the context of sentencing, upholding a Pennsylvania statute that made the visible possession of a firearm during the commission of a crime a sentencing factor to be determined by the trial judge by a preponderance of the evidence. See *id.* at 85 ("*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive.").

2. The text and history of the relevant statutory provisions make clear that Congress conceived of forfeiture under the CCE statute as a punishment, not as an element of the crime. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, directs that "[a]ny person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment * * *, to a fine * * *, and to the forfeiture prescribed in section 853 of this title." 21 U.S.C. 848(a). The statute further provides that "[t]he court, in imposing sentence on [a person convicted under the CCE statute], shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection." 21 U.S.C. 853(a). The Act's legislative history likewise characterizes criminal forfeiture as punishment. See S. Rep. No. 225, 98th Cong., 1st Sess. 193 (1983) (criminal forfeiture "is imposed as a sanction against the defendant upon his conviction"); *id.* at 198 (same). Indeed, petitioner conceded the point in the court of appeals, "acknowledg[ing] that criminal forfeiture under § 853 is a part of the sentence, not a part of the substantive offense." J.A. 322.

3. The courts of appeals have uniformly recognized that "[t]he language of section 853(a) indicates that Congress intended criminal forfeiture of property to be a punishment." *United States* v. *Bieri*, 21 F.3d 819, 821 (8th Cir.), cert. denied, 115 S. Ct. 208 (1994). Thus, all of the courts of appeals that have considered the question have determined that, because forfeiture is a punishment, the forfeitability of particular assets under Section 853(a) must be proved by a preponderance of the evidence rather than by the "reasonable doubt" standard applicable to elements of the offense.[8] See *Bieri*, 21 F.3d

[8] Petitioner contends (Pet. Br. 20 n.12) that this case may be decided in his favor without resolving the question whether forfeitability must be established by proof beyond a reasonable doubt. But if (as petitioner also argues, see *id.* at 44) a criminal defendant is constitutionally entitled to a jury determination of forfeitability, it is difficult to see how a lower standard of proof could suffice. See *Sullivan*, 113 S. Ct. at 2081 ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. * * * In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt."); *United States* v. *Gaudin*, No. 94-514 (June 19, 1995), slip op. 3 (Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt").

at 821-822; *United States* v. *Ben-Hur*, 20 F.3d 313, 317 (7th Cir. 1994); *United States* v. *Elgersma*, 971 F.2d 690 (11th Cir. 1992) (en banc); *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560, 1576-1577 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); *United States* v. *Smith*, 966 F.2d 1045, 1050-1052 (6th Cir. 1992); *United States* v. *Sandini*, 816 F.2d 869, 874-876 (3d Cir. 1987). See also *United States* v. *Saccoccia*, Nos. 93-1618, *et al.* (1st Cir. June 28, 1995), slip op. 59 (for purposes of the extradition laws, "criminal forfeiture is a punishment, not a separate criminal offense"); *United States* v. *Grammatikos*, 633 F.2d 1013, 1025 (2d Cir. 1980) ("[T]he forfeiture provision of 21 U.S.C. § 848 is not an essential element of the offense, but merely an additional penalty for its violation."). Cf. *United States* v. *Pelullo*, 14 F.3d 881, 901-906 (3d Cir. 1994) (concluding that Congress intended preponderance-of-the-evidence standard to apply to CCE forfeiture, but beyond-a-reasonable-doubt standard to RICO forfeiture).

In related contexts, this Court has likewise characterized criminal forfeiture as part of the sentence for the offense. See *Alexander* v. *United States*, 113 S. Ct. 2766, 2775-2776 (1993) ("The *in personam* criminal forfeiture [authorized by RICO] is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"); *United States* v. *$8,850*, 461 U.S. 555, 567 (1983) (noting that a "criminal proceeding * * * may often include forfeiture as part of the sentence"). The Court's statement in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 628 n.5 (1989), that "forfeiture is a substantive charge in the indictment against a defendant" is not to the contrary. See Pet. Br. 19-20. The Court made that observation in rejecting a Sixth Amendment objection to the forfeiture of attorney's fees, noting that the defendant's right to

counsel "for his defence," U.S. Const. Amend. VI, could not be converted to a substantive "defense" against a forfeiture allegation. As the Court elsewhere noted in *Caplin & Drysdale*, however, the drug forfeiture statute provides for the court to order forfeiture "in imposing sentence," 21 U.S.C. 853(a), and the defendant's charged offenses in that case "trigger[ed] this forfeiture provision." 491 U.S. at 620 n.1.

4. To treat the forfeitability of assets as an element of a substantive crime would be anomalous. There is no statutory offense for which an order of forfeiture (or a determination that certain assets are forfeitable) is a prerequisite to conviction. Petitioner, for example, could have been convicted of conducting a continuing criminal enterprise in violation of 21 U.S.C. 848 even if no allegation of forfeiture had been included in the indictment. Indeed, as petitioner notes (Pet. Br. 21 n.13), federal courts frequently conduct bifurcated trials in which the issue of forfeiture is submitted to the jury only after a finding of guilt—a procedural device at odds with the notion that forfeitability is an element of the criminal offense.

Petitioner correctly notes (Pet. Br. 21) that a defendant may plead guilty while contesting the government's forfeiture claims. Petitioner is incorrect, however, in his effort to analogize such a plea to one in which a defendant "plead[s] guilty to one count but not guilty on other counts." *Ibid.* Although petitioner claims to have understood his plea agreement "to contemplate further proceedings to determine which of [his] assets were tainted" (*id.* at 49), he does not and could not claim to have pleaded "not guilty" to any "charge" of forfeiture. Rather, a defendant who pleads guilty but offers no concessions as to the forfeitability of particular property is more accurately analogized

to a defendant who pleads guilty but contests the government's evidence or recommendation regarding the appropriate term of imprisonment.

C. Rules 7(c)(2), 31, and 32 Do Not Establish That The District Court Must Find A Factual Basis Under Rule 11(f) For A Forfeiture Agreement

Petitioner recognizes (Pet. Br. 20 n.12) that forfeiture cannot "be treated *for all purposes* as if it were an element" of an offense. Nevertheless, petitioner contends (*id.* at 15-21) that it is "like an element" (*id.* at 17 n.8) for purposes of Rule 11(f) because it must be alleged in the indictment and submitted to the jury under Rule 7 and Rule 31 of the Federal Rules of Criminal Procedure, and because it is distinguished from the judgment reflecting the "sentence" in Rule 32. Those provisions, however, do not bear on the proper construction of Rule 11(f). Rule 11(f) requires a factual basis for the elements of the crime of which the defendant will be convicted if the court accepts his plea; it does not apply to sentencing determinations to be made thereafter. Although petitioner refers to several provisions in the Federal Rules of Criminal Procedure that were specifically amended to deal with forfeiture issues, no such amendment was made to Rule 11.

1. After Congress enacted criminal forfeiture provisions in the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 943, for RICO violations, and in the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408(a)(2), 84 Stat. 1265-1266, for CCE violations, the Federal Rules of Criminal Procedure were amended in three respects to take account of that development. A new Rule 7(c)(2) was added, which as presently worded states: "No judgment of forfeiture may be entered in a criminal

proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture." Rule 31(e) was amended to provide for a jury determination of the scope of forfeited property: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Finally, Rule 32(d)(2) (in the present Rules) was amended to authorize, on a verdict of forfeiture, "the Attorney General to seize the interest or property subject to forfeiture on terms the court considers proper." Petitioner relies on that package of amendments to argue (Pet. Br. 19) that the "overall structure" of the Rules treats forfeiture as a part of the substantive offense. He places particular reliance (*id.* at 18) on the Advisory Committee's Note accompanying the 1972 amendment to Rule 31, which states: "The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." 18 U.S.C. App. at 793.

The premises that underlay the 1972 amendments to Rules 7, 31, and 32 are of no relevance in construing the "factual basis" requirement. That requirement was placed in Rule 11 in 1966—well before the 1972 amendments. The 1972 amendments did nothing to alter the factual basis requirement, and that requirement, of course, does not expressly cover forfeiture. Just as "the views of one Congress as to the meaning of an act passed by an earlier Congress are not ordinarily of great weight," *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 471 n.6 (1994); *United States* v. *Price*, 361 U.S. 304, 313 (1960), the 1972 Advisory Committee's Notes, even if they were deemed authoritative with respect to the 1972 amendments to Rules 7, 31, and 32, cast no light

on the proper construction of language added to Rule 11 in 1966.

Nor could it plausibly be argued that Rule 11 was implicitly changed to cover criminal forfeiture in 1972. The Federal Rules of Criminal Procedure may be changed only by Act of Congress or by this Court in accordance with the Rules Enabling Act, see 28 U.S.C. 2072, 2074 (1988 & Supp. V 1993). No amendment to Rule 11 could have been effected by the issuance of the 1972 Advisory Committee's Notes accompanying proposed Rules 7(c)(2), 31(e), and 32(d)(2). Cf. *NLRB* v. *Health Care & Retirement Corp. of America*, 114 S. Ct. 1778, 1784-1785 (1994); *American Hospital Ass'n* v. *NLRB*, 499 U.S. 606, 616 (1991). Moreover, the Advisory Committee's Notes to the amendments to Rule 11 that took effect in 1975 reaffirmed that the "factual basis" requirement is concerned with "the issue of guilt or innocence"; the Notes gave no suggestion that Rule 11(f) should be interpreted in light of the Committee's earlier assumption that forfeiture was to be regarded as an element of the criminal offense. See 18 U.S.C. App. at 743.[9]

[9] The question of what weight may be attached to the Advisory Committee's Notes here is different from the issue that divided the plurality and concurring Justices in *Tome* v. *United States*, 115 S. Ct. 696 (1995). The *Tome* plurality treated the Advisory Committee's Notes as substantial evidence of the drafters' intent, see *id.* at 702-708; Justice Scalia, while acknowledging the value of the Notes as "scholarly commentaries," concluded that "they bear no special authoritativeness as the work of the draftsmen," *id.* at 706 (Scalia, J., concurring in part and concurring in the judgment). Petitioner here, however, does not seek to use the Notes (as in *Tome*) to elucidate the meaning or proper application of the particular Rules to which they are appended. Rather, he asserts that the Notes should applied to interpret a different provision, Rule 11(f). The Advisory Committee's comments on one set of rules do not have special weight as to the meaning of another, previously promulgated rule.

Even if the 1972 Advisory Committee's Notes on other rules were deemed to reflect also an implicit comment about the operation of Rule 11, those Notes would not override the language of that Rule. Rule 11(f) does not by its terms require judicial inquiry into admissions or stipulations, included in a plea agreement, regarding the proper scope of criminal forfeiture. Rather, it directs the court to assure itself that there is a factual basis for the "plea"—a term consistently construed as limited to admissions relevant to the elements of the crime. If, as we have shown, criminal forfeiture is not an element of a crime (or an independent substantive offense), the Advisory Committee's mistaken belief to the contrary would not change the meaning of the word "plea." Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988) (committee report that reflects misunderstanding of existing law provides no basis for construing statutory language in other than the normal manner); *Shannon* v. *United States*, 114 S. Ct. 2419, 2426 (1994) (Court has not "given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute" being interpreted).

In addition, petitioner's argument depends on the premise that this Court (in promulgating the 1972 amendments to Rules 7, 31, and 32 in the form proposed by the Advisory Committee) and Congress (in allowing those amendments to take effect without change) shared the Advisory Committee's "assumption" that the forfeitability of particular assets is an element of the substantive offense. Yet the Court and Congress may well have decided to require notice in the indictment of the extent of the interest alleged to be subject to forfeiture, to provide

for the jury rather than the judge to determine the extent of forfeitable property, and to provide for a separate forfeiture term in the judgment, even while recognizing that criminal forfeiture is a punishment rather than an element of the crime.

There can be no doubt, for example, that Congress regarded the new criminal forfeiture provisions it had enacted as criminal punishments. The Senate Report on the bill that resulted in the RICO forfeiture provisions stated: "Fine and imprisonment as criminal sanctions are not new. The use of criminal forfeiture, however, represents an innovative attempt to call on our common law heritage to meet an essentially modern problem." S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969). The Report also quoted extensively from the Department of Justice's comments on the bill, which made clear that the new criminal forfeiture provisions operated "*in personam* against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or imprisonment, but also by forfeiture of all interest in the enterprise." *Id.* at 80. Congress continued to treat criminal forfeiture as a punishment even after the amendments to the Federal Rules of Criminal Procedure on which petitioner relies. When Congress amended the CCE and RICO forfeiture provisions and created new forfeiture penalties for all felony drug cases in 1984, the Senate Report reiterated the view that federal criminal forfeiture "is an *in personam* proceeding against a defendant in a criminal case and is imposed as a sanction against the defendant upon his conviction." S. Rep. No. 225, 98th Cong., 1st Sess. 193 (1983). Congress regarded criminal forfeiture as such a punishment even though noting the forfeiture-related amendments in the Federal Rules of Criminal Procedure. See *id.* at 194 & n.15 (describing procedures and citing

Rules 31 and 32). The Advisory Committee's theory about the nature of criminal forfeiture therefore cannot be imputed to Congress.

D. Imposition Of A "Factual Basis" Requirement Is Neither Necessary Nor Appropriate To Prevent Potential Abuses Of Forfeiture Agreements

Petitioner offers a variety of policy arguments for applying Rule 11(f) to forfeiture stipulations. Such policy considerations provide no warrant for overriding the text of the Rule. In any event, petitioner's concerns are significantly overstated. A sentencing court may generally rely on sentencing stipulations by the parties, and may test their reliability in appropriate cases. Those procedures are applicable to forfeiture stipulations as well.

1. Petitioner contends (Pet. Br. 26-34) that Rule 11(f) should be read to apply to forfeiture stipulations because "the government may abuse forfeiture authority." In the same vein, petitioner's amicus suggests (NACDL Br. 7) that defendants "who are faced with draconian prison sentences under the federal sentencing guidelines * * * have no choice but to take whatever 'deal' is offered them by the government." This Court has previously recognized, however, that any potential for abuse of forfeiture authority should be addressed through case-by-case inquiry into actual overreaching, not through the formulation of broad prophylactic rules. See *Caplin & Drysdale*, 491 U.S. at 634-635.

There is no basis for a claim of overreaching in this case. The court and the parties had a solid basis for believing that petitioner's illicit profits substantially exceeded his known assets as of sentencing, making all of his property forfeitable under the statute. Even if non-forfeitable property had been identified, moreover, the court would have been required to impose a more sub-

stantial fine, including a costs-of-incarceration fine that is mandatory for defendants with the ability to pay. See Guidelines § 5E1.2(i). Presumably, petitioner entered into the forfeiture stipulation because the agreement as a whole gave him substantial benefits, and proceeding with the trial seemed likely to result in more unpleasant consequences. That petitioner's alternatives were unattractive did not make his situation coercive. See, *e.g.*, *United States* v. *Mezzanatto*, 115 S. Ct. 797, 805-806 (1995) ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea.") (internal quotation marks omitted).

2. Petitioner also observes (Pet. Br. 30) that, "[i]n developing the forfeiture provisions for RICO and CCE in 1970, Congress drew a sharp distinction between forfeiture of a defendant's entire estate—which continues to be unlawful—and forfeiture of specific assets shown to have been tainted by criminal conduct." He asserts (*id.* at 31) that, "[i]n the absence of a factual basis requirement for forfeiture pursuant to a guilty plea, the prosecution may use the plea process to exceed the limitations imposed by Congress in section 853, even to the extent of forfeiture of estate." There is no basis for that contention, and in any event it would not justify distorting the text of Rule 11(f) to address the issue.

a. Determination of an appropriate criminal sentence typically involves consideration of a broad array of pertinent information. While the parties may insist upon judicial resolution of factual disputes, they may also reach agreement about the relevant facts and reduce their agreements to formal stipulations for submission to the court. In the plea agreement in this case, for

example, petitioner "agree[d] to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General." J.A. 81. That agreement is best understood as petitioner's stipulation that all of the property he owned met the requirements for forfeiture under 21 U.S.C. 853.

Stipulations regarding the forfeitability of assets are subject to the legal principles governing sentencing stipulations generally. Stipulations may often establish facts bearing directly on the length of a defendant's confinement, yet such stipulations are not subject to the requirements of Rule 11(f), which "does not by its terms apply to circumstances other than formal pleas of guilty." *United States* v. *Lyons*, 898 F.2d 210, 214 (1st Cir.), cert. denied, 498 U.S. 920 (1990). Rather, "[s]tipulations freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions." *United States* v. *Shapiro*, 879 F.2d 468, 470 (9th Cir. 1989) (internal quotation marks omitted). See, *e.g.*, *Mezzanatto*, 115 S. Ct. at 801-806 (enforcing waiver of rights conferred by Rule 11(e)(6) and Fed. R. Evid. 410 without Rule 11 procedures); *Adams* v. *Peterson*, 968 F.2d 835, 839-841 (9th Cir. 1992) (en banc) (same for defendant's stipulation to individual elements of a criminal offense; collecting cases), cert. denied, 113 S. Ct. 1818 (1993); *Lyons*, 898 F.2d at 214-215 (same; collecting cases). See also *Town of Newton* v. *Rumery*, 480 U.S. 386, 394 (1987).

The Sentencing Guidelines expressly provide that "[a] plea agreement may be accompanied by a written stipulation of facts relevant to sentencing." Guidelines § 6B1.4(a).[10] The Guidelines also treat forfeiture as an

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[10] Cf. 18 U.S.C. 3663(a)(3) (Supp. V 1993) (sentencing court "may also order restitution in any criminal case to the extent agreed to by the

aspect of sentencing. See Guidelines § 5E1.4 ("Forfeiture is to be imposed upon a convicted defendant as provided by statute."); see *United States* v. *Investment Enterprises, Inc.*, 10 F.3d 263, 271 (5th Cir. 1993). The Guidelines make clear that "it is not appropriate for the parties to stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such 'facts' for purposes of the litigation." Guidelines § 6B1.4 (Commentary). It is entirely appropriate, however, for government counsel to stipulate to facts that counsel believes to be true but that may be difficult, time consuming, or expensive to prove. Such a stipulation should not be rejected by the court simply because it lacks affirmative record support: The point of a stipulation is to obviate the need for evidentiary proof. Cf., *e.g.*, *Sinicropi* v. *Milone*, 915 F.2d 66, 68 (2d Cir. 1990) ("Courts generally enforce stipulations that narrow the issues in a case."); *FDIC* v. *St. Paul Fire & Marine Ins. Co.*, 942 F.2d 1032, 1038 (6th Cir. 1991) ("Stipulations serve the purpose of conserving judicial resources and allowing the parties to focus on truly disputed issues.").

"The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing." Sentencing Guidelines § 6B1.4(d). Nevertheless, the usual premise of an adversary system is that stipulations to which the parties agree are presumptively valid. And while a

parties in a plea agreement"); *United States* v. *Lavin*, 27 F.3d 40, 42 (2d Cir.) (district court properly ordered restitution of $126,320 although indictment alleged loss of "approximately $119,000"; "[defense] counsel unequivocally stated at sentencing that [defendant] did not contest the $126,320 figure," and "[t]he parties therefore agreed to a different amount than was specified in count two of the indictment"), cert. denied, 115 S. Ct. 453 (1994).

criminal defendant may seek to invalidate a stipulation on the ground that it was procured through fraud or coercion, see *Mezzanatto*, 115 S. Ct. at 806, he should not be permitted to urge the district court to go behind (and reject) the statement of facts that he has admitted to be true.[11]

In this case, the district court reasonably accepted the parties' stipulation that all of petitioner's property was subject to forfeiture. The stipulation was plausible in light of petitioner's admitted criminal conduct, and it was not called into question by the PSR or by evidence presented at trial before petitioner's change of plea. As the court noted in rejecting petitioner's post-sentencing objection to the lack of a factual basis for the forfeiture, "the evidence that I heard before me in the * * * trial I think is sufficient to warrant the granting of forfeiture." J.A. 154. Indeed, at a post-sentencing hearing on third-party claims, one government witness testified that "our best estimate of [petitioner's] drug trafficking is that he had profited in excess of a million dollars, and that was a conservative estimate." J.A. 237. The total value of the forfeited property, however, was only $410,000. J.A. 329. Under the statute's substitute assets provision, 21 U.S.C. 853(p), all of petitioner's property would therefore have been forfeitable even if *none* of petitioner's assets at the

[11] The stipulation in this case might be roughly analogized to the portion of the agreement (see J.A. 80) by which the government promised to recommend the minimum 20-year sentence. Petitioner assumed the risk that the court would decide on its own to impose a longer term, see *United States* v. *Benchimol*, 471 U.S. 453 (1985), but he did not assume the risk that the government would urge the court to do so, see *Santobello*, 404 U.S. at 262. By the same token, the government took the chance that the court would decide on its own to impose a lower forfeiture, but petitioner had no legal right to urge that result and no cause to complain that it was not done.

time of sentencing had facilitated criminal activity or been acquired with illicit proceeds.

b. Even if it were appropriate to subject stipulations regarding forfeiture to more searching judicial scrutiny than is given to sentencing stipulations generally, that scrutiny should not be conducted under the rubric of Rule 11(f). "The normal consequence of a determination that there is not a factual basis for [a] plea [of guilty] would be for the court to set aside the plea and enter a plea of not guilty." Fed. R. Crim. P. 11 advisory committee's note, 18 U.S.C. App. at 739 (1966 Amendment). Because the court's rejection of a forfeiture stipulation would not call into question the defendant's acknowledgement of guilt of the substantive offense, it could provide no basis for setting aside the plea. Rather, the appropriate course would be to accept the plea of guilty, and then to sentence the defendant based on a determination of what assets are forfeitable.[12]

3. Petitioner and his amici contend (Pet. Br. 34-39; NACDL Br. 9-13; FEAR Br. 26-27) that a factual basis inquiry into forfeiture stipulations is necessary to ensure that third parties are not unfairly deprived of property transferred to them by the defendant. Third-party interests, however, are adequately protected through the procedures established by 21 U.S.C. 853(n). Indeed,

[12] Under Federal Rule of Criminal Procedure 11(e)(1)(C), a guilty plea may be made contingent on the court's acceptance of a particular sentencing recommendation; if the court rejects the parties' agreement as to the appropriate sentence, the defendant must be allowed to withdraw the plea. See *United States* v. *Fernandez*, 960 F.2d 771, 771-773 (9th Cir. 1992) (per curiam); Fed. R. Crim. P. 11(e)(4); Guidelines § 6B1.3. If a sentencing stipulation or recommendation contained in a plea agreement were part of the defendant's "plea of guilty" within the meaning of Rule 11(f), *all* plea agreements containing such terms would effectively become Rule 11(e)(1)(C) agreements.

Caplin & Drysdale involved a stipulated forfeiture, see 491 U.S. at 621, and the Court did not suggest that this procedure posed special concerns. This case, as well, illustrates the exercise of jurisdiction by the district court to return to third-party claimants property of which they established ownership. See J.A. 298-312. The court of appeals specifically acknowledged the existence of such jurisdiction. J.A. 318-319. Accordingly, third-party claims may be protected through the procedures directly provided for that purpose, rather than through the indirect means of requiring Rule 11(f) inquiries of the defendant before acceptance of a forfeiture agreement.

E. A "Factual Basis" Determination For Forfeiture Stipulations Is Not Related To Protecting The Knowing And Voluntary Nature Of A Guilty Plea

Finally, petitioner contends (Pet. Br. 21-22) that an inquiry into the factual basis for a forfeiture stipulation furthers the underlying purpose of Rule 11 to ensure that a plea is knowing and voluntary. He maintains (*id.* at 22-25) that this case illustrates the potential for a defendant to misunderstand a forfeiture agreement absent a searching inquiry by the court. In fact, this case illustrates the wisdom of a rule that would preclude a defendant from repudiating a stipulation to which he knowingly agreed with the advice of counsel, particularly when no objection is raised until after the imposition of sentence.

Petitioner argues in this Court that the plea agreement was ambiguous and that he did not intend to concede that all of his property was forfeitable. He also claims (Pet. Br. 25) that he would not have pleaded guilty if he had construed the agreement to include an admission that all of his assets were subject to forfeiture. In the district

court, however, neither petitioner nor his attorney contended that the agreement "contemplate[d] further proceedings to determine which of petitioner's assets were tainted." *Id.* at 49. To the contrary, petitioner's counsel characterized the forfeiture sought by the government as "a bitter pill dealt by Congress, but * * * a pill we must swallow." J.A. 149. Although petitioner objected in the district court to the purported lack of a factual basis for the forfeiture (J.A. 154), he did not contend that he had not *agreed* to the forfeiture.

Based on a detailed examination of the record, the court of appeals concluded that petitioner "intended to forfeit all of his property without requiring the government to prove the assets were forfeitable," J.A. 324; that he did so "unambiguously," J.A. 325; and that he gave a "knowing and voluntary ratification of that agreement at the change of plea hearing," J.A. 326. There is no reason for this Court to reexamine those holdings.

Petitioner argues (Pet. Br. 25) that a factual basis inquiry pursuant to Rule 11(f) would have revealed any misunderstanding concerning the terms of the parties' bargain. The factual basis inquiry mandated by Rule 11(f), however, would generally be an inapt method of revealing hidden misunderstandings between the parties. To the extent that the parties' stipulation appears ambiguous, the court's inquiry should focus on the meaning of the agreement, rather than on the underlying facts; the purpose of a stipulation, after all, is to relieve the litigants of the need to persuade the court that the stipulated facts are true.

Petitioner's belated effort to extricate himself from the stipulations he made should be rejected. As the court of appeals noted, petitioner obtained substantial benefits from the plea agreement, including the government's

willingness to forgo prosecution on all counts but the CCE and the recommendation of the minimum term of imprisonment. J.A. 325. The district court properly accepted the guilty plea after determining, through extensive colloquy, see J.A. 84-121, that there was a factual basis for petitioner's admission of guilt. No more was required to comply with Rule 11(f). There is, accordingly, no basis for permitting petitioner to deprive the government of the benefits it sought to obtain under the agreement, while petitioner retains the benefits the agreement afforded him.

II. PETITIONER'S FORFEITURE STIPULATION WAIVED THE RIGHT TO A JURY DETERMINATION ON FORFEITURE ISSUES

Federal Rule of Criminal Procedure 31(e) provides that, "[i]f the indictment or information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." As construed by the courts below, the plea agreement in this case reflected the agreement of the parties that the court (rather than a jury) would make the determination regarding the forfeitability of petitioner's assets.[13]

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[13] At the change of plea hearing, the district court stated (J.A. 87) that, if petitioner elected to plead guilty, the jury would be dismissed. Neither petitioner nor his attorney objected to the jury's dismissal. Nor did petitioner or his attorney assert, in response to the government's subsequent motion for forfeiture, that the issue should be resolved by a jury rather than the court. The court of appeals noted that "there is no evidence at [the change of plea] hearing that [petitioner] wanted a jury trial on the forfeiture issue, or thought he was going to have one," J.A. 328; and the court of appeals, like the district court, construed the plea agreement as waiving petitioner's rights under Rule 31(e), J.A. 327-328. In this Court, petitioner states only that "the agreement seems to contemplate further proceedings to

Petitioner acknowledges, as he must, that the provisions of Rule 31(e) are subject to waiver—*i.e.*, a defendant may agree that the scope of criminal forfeiture will be determined by the court. See *United States* v. *Mezzanatto*, *supra*. He contends, however, that such an agreement may be enforced only if the defendant himself is shown to have been cognizant of his right to a jury finding on the scope of forfeiture. That argument is without merit.

This Court's decisions establish a narrow category of particularly fundamental constitutional rights that may not be waived without meeting the stringent standards of "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). There is, however, no constitutional right to a jury determination of forfeiture. While there is a right under Rule 31(e) to such a jury determination, neither the Federal Rules of Criminal Procedure nor this Court's decisions require that a defendant be specifically apprised of that right before it may be waived. In this case, petitioner voluntarily and intentionally agreed to remove any dispute about the scope of his forfeitable assets by entering into a stipulation that all of his assets were forfeitable. The effect of that stipulation was to waive any right to litigate those issues further, before a jury or otherwise. Under applicable waiver principles, his surrender of his rights under Rule 31(e) was entirely valid.[14]

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determine which of petitioner's assets were tainted, though there was no indication of the mechanism for that determination." Pet. Br. 49.

[14] It is not clear whether petitioner contends that his guilty plea was invalid because he was not informed about his Rule 31(e) rights, or, rather, whether he accepts his guilty plea and challenges only the validity of his waiver of a jury trial on forfeiture issues. Neither approach, however, would have merit.

A. The Sixth Amendment Does Not Protect The Right To A Jury Trial On Forfeiture

Petitioner contends (Pet. Br. 41-45) that the right to submit the issue of criminal forfeiture to the jury is protected by the Sixth Amendment, which states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." That contention is incorrect. "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States* v. *Gaudin*, No. 94-514 (June 19, 1995), slip op. 5. A determination that particular assets are subject to forfeiture, however, goes not to the establishment of the elements of the crime or to the "ultimate conclusion of guilt or innocence," *id.* at 9, but to the appropriate sentence for the offense. See pages 19-24, *supra*. While "[a] defendant charged with a serious crime has the right to have a jury determine his guilt or innocence," *Cabana* v. *Bullock*, 474 U.S. 376, 384 (1986) (citing *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)), "[t]he decision whether a particular punishment * * * is appropriate in any given case is not one that [the Court] ha[s] ever required to be made by a jury," *Cabana*, 474 U.S. at 385. Accord *McMillan* v. *Pennsylvania*, 477 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

Petitioner's reliance (Pet. Br. 41) on "the common law tradition of submitting forfeiture to the petit jury" as a basis for incorporating forfeiture into the Sixth Amendment is misplaced. As the authorities discussed by petitioner (see *id.* at 29 n.21, 42-44) make clear, findings regarding the nexus between particular assets and a defendant's criminal activities were irrelevant to common law *in personam* criminal forfeiture. Rather,

the necessary consequence of conviction for specified crimes was the forfeiture of *all* of the defendant's property.[15] The jury's limited role was to determine what assets the defendant owned. That modest function does not suggest that the Framers would have perceived the jury in a forfeiture case as a central right of the defendant in a criminal trial. See Note, *A Proposal To Reform Criminal Forfeiture Under RICO and CCE*, 97 Harv. L. Rev. 1929, 1937-1938 (1984) ("Although it is true that at common law the jury customarily reported the size of the defendant's holdings after announcing the verdict in a felony case, this jury report was simply one of a number of bookkeeping devices used to facilitate collection of the forfeiture penalty. Under the common law rule, all the offender's property was forfeited; the jury had no legal power to protect the defendant against an excessive forfeiture.").

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[15] In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974), the Court explained that "[f]orfeitures also resulted at common law from conviction for felonies and treason. The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown. See 3 W. Holdsworth, History of English Law 68-71 (3d ed. 1927); 1 F. Pollock & F. Maitland, History of English Law 351 (2d ed. 1909). The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property. See 1 W. Blackstone, Commentaries *299." See also *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) ("It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown."); *United States* v. *Sandini*, 816 F.2d at 873 (referring to "the traditional forfeiture of all of a felon's property even if it had no connection with the crime"); *United States* v. *Grande*, 620 F.2d 1026, 1038 (4th Cir.) ("Under early English law, the complete forfeiture of all real and personal property followed as a consequence of conviction of a felony or treason."), cert. denied, 449 U.S. 830, 919 (1980).

There is consequently no basis for the assertion that determinations of the sort required by Section 853 were traditionally made by English (or early American) juries in criminal prosecutions. Nor is there any foundation for the view that forfeiture issues are so fundamental that they alone, among all sentencing issues, must be decided by a jury as a matter of constitutional right. Just as there is no right to jury sentencing in a capital case, there is no right to jury sentencing on forfeiture issues. See *Clemons* v. *Mississippi*, 494 U.S. 738, 745 (1990) ("Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by * * * this Court."); *Hildwin* v. *Florida*, 490 U.S. 638, 640-641 (1989) (per curiam) ("[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."); *Walton* v. *Arizona*, 497 U.S. 639, 647-648 (1990) (sustaining capital sentencing scheme that did not require jury involvement in sentencing).

B. The Right Under Rule 31(e) To A Jury Trial On Forfeiture Issues Was Waived By Petitioner's Agreement To Forfeit His Assets

Petitioner contends that, even if the right to a jury determination on forfeiture is not of constitutional dimension, a defendant must be specifically advised of that right because "Rule 31(e) expresses a fundamental judgment about the safeguards that are necessary when the government seeks to impose forfeiture as well as imprisonment on an accused." Pet. Br. 47. That contention is supported neither by the structure of the Federal Rules of Criminal Procedure, nor by general principles regarding the waiver of rights.

1. The Federal Rules of Criminal Procedure contain detailed provisions governing the waiver of rights in conjunction with a plea of guilty. Rule 11(c) identifies the information that the court must communicate to a criminal defendant in order to ensure the validity of a guilty plea. Rule 11(c)(3) does not require that a criminal defendant be advised of his right, pursuant to Rule 31(e), to a special jury verdict regarding "the extent of the interest or property subject to forfeiture." The district court *is* required to inform the defendant of a small set of fundamental rights of procedure in a criminal trial that Congress specified in 1975, see Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3(5), 89 Stat. 371, on the theory that "the warnings given to the defendant ought to include those that *Boykin* v. *Alabama*, 395 U.S. 238 (1969), said were constitutionally required." H.R. Rep. No. 247, 94th Cong., 1st Sess. 7 (1973) (*1975 House Report*).[16] Because the right to a jury determination of forfeiture provided

[16] The proposed Rule 11(c) transmitted by this Court to Congress in 1974 would have required a substantially less extensive colloquy than the Rule as enacted. See 94 S. Ct. 3275, 3279 (1974). Although the 1975 House Report describes the additional warnings mandated by current Rule 11(c)(3) as "constitutionally required" under *Boykin*, see *1975 House Report* 7, *Boykin* does not actually so hold. Rather, *Boykin* states that the rights subsequently enumerated in Rule 11(c)(3) can be validly waived only by a defendant with actual knowledge of their existence, and that a reviewing court "cannot presume a waiver of these three important federal rights from a silent record." 395 U.S. at 243. The *Boykin* Court did not require, as a matter of constitutional law, that a defendant receive the pertinent information from the trial court itself. See also *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969) (procedures required by Rule 11 "ha[ve] not been held to be constitutionally mandated").

by Rule 31(e) stands on a nonconstitutional footing, it is not covered in the required colloquy.[17]

That understanding of Rule 11(c)(3) is buttressed by Rule 11(c)(1), which describes the sentencing information that must be communicated by the court to the defendant before a guilty plea can be accepted. The court is required to inform the defendant of "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and when applicable, that the court may also order the defendant to make restitution to any victim of the offense." Fed. R. Crim. P. 11(c)(1). The Rule thus requires that the defendant be made aware of a variety of factors bearing upon the sentence he is likely to receive upon pleading guilty. The Rule does not, however, require the provision of complete and detailed information concerning the sentence to which

[17] Even if petitioner were correct in arguing that the determination of what property is forfeitable is "a part of the criminal prosecution for purposes of the Sixth Amendment" (Pet. Br. 45), the district court's failure to inform him specifically of that aspect of his jury trial right would not render his plea invalid or undermine the validity of his forfeiture stipulation. At the change of plea hearing, the court advised petitioner that "you have a right to a speedy and public jury trial, which we're in the middle of." J.A. 86; see also J.A. 80 (plea agreement acknowledged waiver of "the right to a jury trial"). The colloquy was sufficient to satisfy Rule 11(c)(3), which simply requires the court to inform the defendant that he has "the right to be tried by a jury." Similarly, the *Johnson* v. *Zerbst* standard for waiver of the right to jury trial requires that the defendant be generally cognizant of the existence of that right, but it does not require him to understand the precise scope of the issues within the jury's authority.

the defendant would be subject if he proceeded to trial and were ultimately convicted. Cf. *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970) (defendant's guilty plea was intelligently made despite his reasonable but mistaken belief, at the time the plea was entered, that if tried and convicted he would be subject to a possible sentence of death). It would therefore be anomalous to require the district court to advise the defendant regarding the procedural mechanism by which sentence would be imposed if the defendant declined to plead guilty but was convicted at trial.[18]

2. Petitioner argues (Pet. Br. 47-48) that only a "knowing and intelligent waiver" under the standard

[18] Petitioner's suggestion (Pet. Br. 47-48) that Rule 23(a) indicates that the Rules contemplate a specific waiver of the right to a jury trial on forfeiture is misplaced. Rule 23(a) provides that "[c]ases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." As the Advisory Committee's Notes make clear, "[t]h[e] rule is a formulation of the constitutional guaranty of trial by jury," and the written waiver requirement was designed to conform to the existing practice at the time of adoption of the rule in 1944. 18 U.S.C. App. at 783. Nothing in the text or Advisory Committee's comments suggests that this provision (or any similar requirement) applies to the waiver of the right under Rule 31(e) to a jury verdict on forfeiture issues. Moreover, Rule 23 applies to "*Trial* by Jury or by the Court" (emphasis added), see also Rule 23(c) (outlining procedures applicable to "Trial Without a Jury"), and applies only when the defendant desires a trial before the court without a jury. See *Singer* v. *United States*, 380 U.S. 24 (1965). Its procedures are distinct from the Rules governing "Pleas" (Rule 11) and "Sentence and Judgment" (Rule 32). Finally, petitioner in his written plea agreement expressly waived "the right to a jury trial" and consented to the forfeiture of all his assets. J.A. 80, 81. Even if the right to a jury determination of forfeiture were part of the right to trial by jury protected by the Sixth Amendment, petitioner's written waiver was sufficient to comply with both the Constitution and Rule 23. See note 17, *supra*.

of *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), can extinguish a criminal defendant's right under Rule 31(e) to a jury determination on forfeiture issues. There is no basis for applying that stringent standard in this context. A defendant who voluntarily and intentionally enters into an agreement to specify the scope of his forfeitable assets is bound by his agreement, even though the court may not have personally informed him about a variety of legal rights that may bear on the wisdom or desirability of his chosen course of action. The defendant may not later invalidate his agreement on the theory that he was unaware of procedural rights, such as Rule 31(e), that would have been available if he had contested the government's allegations.

The principle that a defendant may waive rights of which he has not been specifically advised by the court is consistent with the law of waiver generally. " 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). A requirement that the defendant must have specific knowledge of a right to waive it is a rare exception. A plea of guilty, for example, constitutes a waiver of the constitutional rights to a jury trial, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. See *Parke* v. *Raley*, 113 S. Ct. 517, 523 (1992); *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). For the plea to be valid, the defendant must be aware of those rights and intentionally relinquish them. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). But a valid guilty plea also relinquishes a variety of other constitutional and

statutory rights. Neither this Court's cases nor Rule 11 requires the defendant to be aware of all of those rights before his plea of guilty may extinguish them.

For example, a guilty plea extinguishes constitutional defenses of which the defendant may have no knowledge. In *United States* v. *Broce*, 488 U.S. 563, 573 (1989), this Court noted that "[o]ur decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty." The Court then held that the plea in that case had relinquished a potential defense under the Double Jeopardy Clause of which the defendant had no knowledge. *Id.* at 572-574. See also *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973) ("A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge."). Similarly, a defendant has the right to challenge preindictment delay under the Due Process Clause, to insist on a speedy trial under the Sixth Amendment, to invoke the exclusionary rule under the Fourth Amendment, and to require the production of exculpatory evidence under the Due Process Clause. A guilty plea waives all of those rights. See *Smith* v. *United States*, 876 F.2d 655, 657 (8th Cir.) (per curiam) (defendant's guilty plea "waived his claims on search and seizure * * * and failure to disclose favorable evidence"), cert. denied, 493 U.S. 869 (1989); *Tiemens* v. *United States*, 724 F.2d 928, 929 (11th Cir.) (per curiam) (guilty plea waived right to speedy trial and claim of preindictment delay), cert. denied, 469 U.S. 837 (1984). Yet this Court has never suggested that waivers of those rights are invalid if the defendant was not told that he possessed them at the time of his plea.

The same is true with respect to statutory rights. The acceptance of the plea of guilty waives the right to

enforce the discovery provisions of Federal Rule of Criminal Procedure 16, the right to the production of statements under the Jencks Act (18 U.S.C. 3500), and the right to have guilt or innocence determined at a trial governed by the Federal Rules of Evidence. None of those waivers is vulnerable on the basis that the defendant may not have known about the existence of the underlying right. See also *Peretz* v. *United States*, 501 U.S. 923 (1991) (defendant may validly consent to selection of a jury by a magistrate, thus waiving statutory and possible Art. III rights; no suggestion that defendant must be aware of those rights); *United States* v. *Gagnon*, 470 U.S. 522, 528 (1985) (per curiam) (defendant's voluntary absence waived the right to be present under the Constitution and Fed. R. Crim. P. 43, even though there was no express waiver); *Acevedo-Ramos* v. *United States*, 961 F.2d 305, 308-309 (1st Cir.) ("[L]ike other affirmative defenses, the statute of limitations is deemed waived when a defendant pleads guilty even if the defendant did not make a knowing and express waiver of the defense."), cert. denied, 113 S. Ct. 299 (1992); *Lebowitz* v. *United States*, 877 F.2d 207, 209-210 (2d Cir. 1989) (guilty plea waived right to assert an alleged Speedy Trial Act violation); *Baxter* v. *United States*, 966 F.2d 387, 389 (8th Cir. 1992) (per curiam) (guilty plea waived right to assert an alleged violation of the Interstate Agreement on Detainers). A defendant's voluntary conduct can thus waive a variety of rights of which he may be unaware. There is no principled basis on which Rule 31(e) rights can be deemed more "fundamental" or more difficult to waive than those rights. See *United States* v. *Zang*, 703 F.2d 1186, 1194-1195 (10th Cir. 1982) ("The parties can waive their right

to a special verdict [under Rule 31(e)] by not making a timely request."), cert. denied, 464 U.S. 828 (1983).[19]

Beyond the very small set of rights that this Court has identified as requiring a personal waiver, the explanation of a defendant's rights is generally the province of counsel for the defendant. In an adversary system, defense counsel bears primary responsibility for advising his client concerning the advantages and disadvantages of a guilty plea and associated concessions. So long as the district court conducts the colloquy mandated by Rule 11(c), "[a] failure by counsel to provide [additional] advice may form the basis of a claim of ineffective assistance of counsel, but absent such a claim it cannot serve as the predicate for setting aside a valid plea." *Broce*, 488 U.S. at 574; *Hill* v. *Lockhart*, 474 U.S. 52 (1985).[20]

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[19] In *United States* v. *Robinson*, 8 F.3d 418 (7th Cir. 1993), the court of appeals concluded that the Rule 31(e) right to a jury trial on forfeiture was "important" enough to require a knowing and voluntary waiver. *Id.* at 421 (relying on authority requiring a defendant's knowing and voluntary waiver of the right to appeal). *Robinson*, however, did not explain its conclusion on the "importance" of the right, or why other statutory rights could be waived without meeting the "standard for evaluating waivers of constitutional rights." *Id.* at 421-422.

[20] Indeed, many rights can be waived by the act or omission of trial counsel alone, without the participation of the defendant in the decision. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965) (counsel's failure to object contemporaneously to the admission of evidence as a part of trial strategy binds the defendant); *Faretta* v. *California*, 422 U.S. 806, 820-821 (1975) ("law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas"); *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988) ("[T]he lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval."); *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986) ("So long as a defendant is represented by counsel whose performance is

That principle is fully applicable here. Petitioner elected to reach agreement with the government regarding a disposition of this case, and to remove from the realm of dispute whether his assets were subject to forfeiture. He did so in the context of a plea agreement entered into with the advice of counsel, which was designed to end litigation before the jury on the question of his guilt and to proceed to sentencing in accordance with the agreed-upon terms. The necessary effect of that agreement was to forgo his Rule 31(e) right to a jury trial on the issue of forfeiture. It was not the court's responsibility to apprise petitioner of Rule 31(e) before accepting his stipulation regarding forfeiture. Rather, even if knowledge of that right might conceivably have induced petitioner to reject the plea agreement and proceed with trial, that issue, like many other issues that may have affected petitioner's decision, fell to counsel to explore with petitioner.

Petitioner's contrary approach would subvert the ability of plea agreements to secure "prompt and largely final disposition of most criminal cases." *Santobello* v. *New York*, 404 U.S. 257, 261 (1971). In most settings, courts can currently protect the defendant's rights by engaging in the colloquy required by Rule 11(c). Petitioner's expansive application of the *Johnson* v. *Zerbst* standard, however, would replace the relative certainty of Rule 11(c) with a free-form inquiry into whether any of the myriad statutory (or constitutional) rights surrendered in the course of a guilty plea or subsequent sentencing were comparably "fundamental."

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not constitutionally ineffective under the standard established in *Strickland* v. *Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.").

As one court has noted, "Rule 11's value is as a formulary." *United States* v. *Wenger*, No. 93-4043 (7th Cir. June 15, 1995), slip op. 3. Ad hoc additions to the colloquy that a court must conduct with a defendant before accepting a plea of guilty would inject considerable uncertainty into the disposition of plea agreements.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1995

APPENDIX

Federal Rule of Criminal Procedure 7(c)(2) provides:

> **Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

Federal Rule of Criminal Procedure 11(c) provides:

> **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and
>
> (2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and
>
> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine

adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

Federal Rule of Criminal Procedure 11(f) provides:

Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

Federal Rule of Criminal Procedure 23 provides:

Trial by Jury or by the Court

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it

necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Federal Rule of Criminal Procedure 31(e) provides:

Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Federal Rule of Criminal Procedure 32(d)(2) provides:

Criminal Forfeiture. When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

21 U.S.C. 848(a) provides:

Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in

section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

21 U.S.C. 853(a) provides:

Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording

a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

21 U.S.C. 853(p) provides:

Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).